No. 14,432

(and Consolidated Cases Nos. 14,432-14,440 and Nos. 14,442-and 14,446)

No. 14,441

In the United States Court of Appeals for the Ninth Circuit

UNITED STATES OF AMERICA, APPELLANT

v.

DIX BOX COMPANY AND BENJAMIN DIX, DOING BUSINESS AS DIX BOX COMPANY, APPELLEE

UNITED STATES OF AMERICA, APPELLANT

v.

HELEN CARVAJAL, APPELLEE

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF CALIFORNIA, CENTRAL DIVISION

BRIEF FOR APPELLANT

WARREN E. BURGER,
Assistant Attorney General.
LAUGHLIN E. WATERS,
United States Attorney.
SAMUEL D. SLADE,
JOHN J. COUND,
Attorneys,
Department of Justice,
Washington 25, D. C.

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JURISDICTIONAL STATEMENT

The United States, on May 1, 1953, instituted an action against each of the defendants here involved,[1] to recover treble the amount of overcharges which the

[1] Fifteen actions in all were instituted. The defendants in fourteen of these actions have agreed, with the consent of this Court,

defendants were alleged to have received for goods sold between May 5, 1952, and January 31, 1953, in excess of ceiling prices established by Ceiling Price Regulation 142, issued under the authority of the Defense Production Act of 1950, as amended, 50 U. S. C. App. § 2061 *et seq.* (R. Dix 3-7, R. Carvajal 3-6). Jurisdiction was invoked under Section 706(b) of the Defense Production Act, as amended, 50 U. S. C. App. § 2156(b), and on 28 U. S. C. § 1345. Judgments for the defendants were entered in all cases, save No. 14,441, on March 1, 1954 (R. Dix 24-25), and in that case on April 16, 1954 (R. Carvajal 13-14). Notices of appeal were filed by the United States on April 28, 1954 (R. Dix 25, R. Carvajal 14-15). The jurisdiction of this Court rests upon 28 U. S. C. § 1291.

STATEMENT OF THE CASE

The Government in these cases contends that the appellees, between May 5, 1952, and January 31, 1953, sold goods for prices in excess of the ceilings established by an applicable regulation of the Office of Price Stabilization and claims treble the amount of these overcharges under Section 409(c) of the Defense Production Act of 1950, 50 U. S. C. App. § 2109(c). In all of the cases except No. 14,441 (*United States* v. *Helen Carvajal*), the appellees stipulated that the number of sales and prices charged, as set forth by the Government, were correct (R. Dix 13-14), but contended that

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that the appeals in their cases may be consolidated for briefing and argument on a single printed record (R. Dix 248). The defendant in the fifteenth case has consented with the approval of this Court to the filing of a single brief by the United States. References to the record in No. 14,432 (consolidated with thirteen other cases) will be indicated as R. Dix —, to the record in No. 14,441 as R. Carvajal —.

the regulation which they were alleged to have violated was invalid, and that, moreover, the Government was estopped from enforcing the regulation by reason of actions and representations of officials in the Los Angeles office of the Office of Price Stabilization. The District Court ruled for the appellees on both contentions. No. 14,441 was not tried together with the other cases, and no stipulation as to prices charged or goods sold was there entered.[2] Judgment for the appellee was entered in that case on the grounds which had obtained in the other fourteen cases, and in addition the court held that this appellee was not subject to the regulation in question by its terms.

The appellees were each engaged during the period in question and for varying lengths of time before then in purchasing, reconditioning, and then selling used agricultural containers in the Southern California area (R. Dix 18, R. Carvajal 9). Pursuant to authority vested in the President of the United States by the Defense Production Act of 1950, 64 Stat. 798, 50 U. S. C. App. 2061 *et seq.,* and by him duly delegated to the Director of Price Stabilization, ceiling prices for the appellees' sales of used agricultural containers were originally fixed at the highest prices obtained by them between December 20, 1950, and January 19, 1951, as provided by the General Ceiling Price Regulation, 16 F. R. 808 (Jan. 30, 1951), 5424 (June 8, 1951) (R. Dix 19, R. Carvajal 10). The business of the appellees was subject to sea-

[2] The trial court, however, found that appellee Carvajal "followed the examples of the Association" which had informed the duly authorized representatives of the Office of Price Stabilization that they would and thereafter did continue to comply with the ceiling prices as established by the said Order L-117 and the General Ceiling Price Regulation, both of which CPR No. 142 purported to supersede.

sonal variation, and this base period fell within a slack season. The appellees therefore, through attorneys, filed a protest with the Office of Price Stabilization in Washington, complaining that the prices which they had obtained during this base period did not properly reflect their business (R. Dix 19-20, R. Carvajal 10-11). In consequence, the OPS, pursuant to the General Ceiling Price Regulation, issued Order L-117 on June 28, 1951, setting revised ceiling prices for certain of the goods sold by the appellees (R. Dix 92-95).

On April 29, 1952, the OPS issued Ceiling Price Regulation No. 142 (17 F. R. 3822, R. Dix 36-38), which superseded the General Ceiling Price Regulation with respect to the transactions covered, and established new ceilings upon both the prices which the appellees might charge and the prices which the retailers who sold to them might receive. On learning of this new regulation the appellees, through five of them acting as representatives of all, met with officials of the Los Angeles office of OPS and stated to those officials that they could not continue profitably in business under this regulation. At the first meeting, which was held sometime in early May, 1952, the Los Angeles officials agreed to investigate the situation with a view to having the regulation changed. Similar meetings continued to be held until January 20, 1953, when all ceilings with respect to the appellees were lifted. The trial court has found (R. Dix 21-22, R. Carvajal 11-12) that at each of these meetings there was agreement between the representatives, both industry and OPS, that the prices established by CPR 142 resulted in lowering the margin of gross profit to the dealer to such an extent that it would require operation at a net loss and that the Los Angeles office would make the necessary investigations and recommendations to

Washington to have the regulation amended. The defendants were informed that it might be helpful but would not be necessary for them to engage attorneys (R. Dix 22).

The trial court also found that the appellees had stated to the Los Angeles officials that they would continue to operate under L-117 and the General Ceiling Price Regulation and that they did, in fact, so continue with the knowledge of the Los Angeles office (R. Dix 22, R. Carvajal 12). There was, however, conflicting testimony among the appellees as to whether they had ever been told by the OPS representatives that they might so continue. Two of the appellees who had been among the five representatives at the meetings testified that they had not been told they could continue and that they had not been told they could not (R. Dix 121, 198). One appellee, who also had attended the meetings, testified that he was told that "it was all right to use L-117" (R. Dix 221), but was unable to state who it was that had told him (R. Dix 223). It was not contested that no written permission or authority to continue under L-117 or to ignore CPR No. 142 was ever received by any appellee (R. Dix 197).

The trial judge also found that no attempt was made by the Director of Price Stabilization or his representatives to consult with any dealers in the used agricultural containers business prior to the promulgation of CPR 142 (R. Dix 20-21, R. Carvajal 11). The court found in this a failure to comply with Section 404 of the Defense Production Act, 64 Stat. 807, 50 U. S. C. App. Section 2104, and on this basis declared CPR 142 void and of no force and effect (R. Dix 23, R. Carvajal 12). He found, moreover, that the "conduct and prom-

ises, expressed and implied," of the Los Angeles representatives of OPS estopped the President of the United States and those to whom he had delegated authority from enforcing CPR 142 (R. Dix 23, R. Carvajal 13).

Appellee Carvajal, unlike the other fourteen appellees, did not, during the period in question, purchase used containers from retailers who had received them filled with fruits and vegetables. She purchased all of her containers from dealers. Because CPR 142 set prices only for dealers and for retailers, and because it defined dealers as those who purchased from retailers for resale, and because appellee Carvajal was clearly not a retailer, the trial court ordered judgment in her favor on the grounds that the regulation did not apply to her as well as on the two grounds on which judgment for the other fourteen appellees had been predicated (R. Carvajal 12-13).

QUESTIONS PRESENTED

1. Whether the court below had jurisdiction to declare void a regulation promulgated under the Defense Production Act by the Director of Price Stabilization.

2. Whether in any event such a regulation may be declared invalid because of a failure of the Director to advise and consult with the members of the industry concerned before issuing it.

3. Whether the President of the United States and those to whom he has delegated authority may be estopped by the conduct and promises of those Office of Price Stabilization officials here involved in the circumstances of this case.

4. Whether one who purchased used agricultural containers from dealers rather than from retailers, and then reconditioned and resold them, was herself a dealer subject to Ceiling Price Regulation 142.

STATUTES INVOLVED

The pertinent provisions of the Defense Production Act of 1950, 50 U. S. C. App. §§ 2061 *et seq.*, are printed in the Appendix to this brief, *infra*, pp. ~~23-27~~. 24-28

SPECIFICATIONS OF ERROR RELIED ON

1. The District Court erred in declaring Ceiling Price Regulation 142 void.

2. The District Court erred in declaring the Price Regulation void because of a failure of the Director of Price Stabilization to comply with the provisions of 50 U. S. C. Appendix, Section 2104.

3. The District Court erred in holding the President and those to whom he has delegated authority estopped from enforcing the provisions of Ceiling Price Regulation 142.

4. The District Court erred in holding that the appellee in No. 14,441 was not a dealer subject to Ceiling Price Regulation 142.

ARGUMENT

I

The District Court Was Without Power to Declare CPR 142 Void and of No Force and Effect, Because Exclusive Jurisdiction to Determine the Validity of Such a Regulation Rests With the Emergency Court of Appeals and on Review Therefrom With the Supreme Court.

1. In enacting the Defense Production Act of 1950, Congress provided in language almost identical to that which it had used in the Emergency Price Control Act of 1942 that the regulation and orders issued under the Act would be subject to review as to their validity only in a special tribunal which could give experienced analysis and uniform application to the measures taken in administering the Act. Although other courts would take part in the enforcement of these regulations, the

regulations themselves could not be questioned therein. The language which Congress used was explicit (Defense Production Act, § 408(c), as amended, 50 U. S. C. App. § 2017 (c)):

> * * * The Emergency Court of Appeals, and the Supreme Court upon review of judgments and orders of the Emergency Court of Appeals, shall have exclusive jurisdiction to determine the validity of any regulation or order relating to price controls issued under this title [Title 50, App. U. S. C. §§2101-2112], * * * of the provision of any such regulation or order. Except as provided in this section, no court, Federal, State, or Territorial, shall have jurisdiction or power to consider the validity of any such regulation or order relating to price controls, or to stay, restrain, enjoin, or set aside, in whole or in part, any provision of this title [said sections] * * * authorizing the issuance of such regulations or orders, or any provision of any such regulation or order, or to restrain or enjoin the enforcement of any such provision.

When almost identical language appeared in the Emergency Price Control Act of 1942, 50 U. S. C. App. § 924,[3] both the effectiveness and the constitutionality of the clause came under attack. The Supreme Court

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[3] The only difference in the provisions of the 1942 and 1950 Acts relating to exclusive jurisdiction derives from certain differences in the terminology of the Acts. The critical wording "The Emergency Court of Appeals, and the Supreme Court upon review of judgments and orders of the Emergency Court of Appeals, shall have exclusive jurisdiction to determine the validity of any regulation or order * * * " appears in both statutes. For the convenience of the Court we have set out the pertinent texts of each Act in the Appendix, *infra*, pp. ~~23-24~~ 24-25

itself again and again upheld the provision and gave full force to its words, *Lockerty* v. *Phillips,* 319 U. S. 182; *Yakus* v. *United States,* 321 U. S. 414; *Bowles* v. *Willingham,* 321 U. S. 503, 521; *Bowles* v. *Case,* 327 U. S. 92, and the resulting exclusive jurisdiction of the Emergency Court of Appeals was consistently recognized by this Court. *Rosensweig* v. *United States,* 144 F. 2d 30, certiorari denied, 323 U. S. 764; *Bowles* v. *Lighthouse Oysters, Inc.,* 151 F. 2d 435; *Bowles* v. *Wheeler,* 152 F. 2d 34, certiorari denied, 326 U. S. 775; *Blumenthal* v. *United States,* 158 F. 2d 883, rehearing denied, 158 F. 2d 762, affirmed, 332 U. S. 539; *Fleming* v. *Dashiel,* 161 F. 2d 612; *Shyman* v. *Fleming,* 163 F. 2d 461, certiorari denied, 332 U. S. 844.

Under the 1942 Act, consideration of the validity of price regulations and orders was declared foreclosed in courts other than the Emergency Court of Appeals no matter how the issue might be raised, whether by an action to enjoin enforcement, *Lockerty* v. *Phillips,* 319 U. S. 182, or as a defense in a criminal prosecution, *Yakus* v. *United States,* 321 U. S. 414, *Blumenthal* v. *United States,* 158 F. 2d 883 (C. A. 9), rehearing denied, 158 F. 2d 762, affirmed, 332 U. S. 539, or civil action brought by the Administration for treble damages, *Bowles* v. *American Brewery, Inc.,* 146 F. 2d 842 (C. A. 4), *Bowles* v. *Wheeler,* 152 F. 2d 34 (C. A. 9), certiorari denied, 326 U. S. 775, *Superior Packing Company* v. *Porter,* 156 F. 2d 193 (C. A. 8) certiorari denied, 329 U. S. 788. Moreover, contentions that the Administrator had failed to comply with statutory prerequisites to the issuance of a regulation were held to be attacks upon the validity of the regulation, and thus were refused consideration in the ordinary courts. *Rosensweig* v. *United States,* 144 F. 2d 30 (C. A. 9), cer-

tiorari denied, 323 U. S. 764, *Bowles* v. *American Brewery,* 146 F. 2d 842 (C. A. 4), *Superior Packing Company* v. *Porter,* 156 F. 2d 193 (C. A. 8) certiorari denied, 329 U. S. 788.

The intention of Congress is no less clearly stated in the Defense Production Act that the validity of any price regulation issued under its authority should be subject only to the determination of a single court, experienced in dealing with similar orders. The almost identical language used of course evidences a conscious effort to obtain the effect of the earlier law, which had also been concerned with economic regulation in a national emergency. That effect, if ever in doubt, had now been definitively settled by the courts, and in repeating its former language Congress must be assumed to have been aware of those decisions and to have incorporated their result in the new statute. Cf. *Sessions* v. *Romadka,* 145 U. S. 29, 42; *United States* v. *Ryan,* 284 U. S. 167, 175. The small number of cases in which the issue has been raised under the Defense Production Act attests the general acceptance of the exclusive jurisdiction of the Emergency Court of Appeals, and where it has been raised the answer has been that no other court may concern itself with the validity of any price regulation. *Fast* v. *DiSalle,* 193 F. 2d 181, 184 (Em. C. A.); *United States* v. *Excel Packing Company,* 210 F. 2d 596 (C. A. 10) certiorari denied, 348 U. S. 817; *United States* v. *Ericson,* 102 F. Supp. 376 (D. Minn.) appeal dismissed on stipulation of parties, 205 F. 2d 420; *United States* v. *Walton Motors,* 114 F. Supp. 83 (D. Utah).

We submit, therefore, that the court below clearly was without authority to consider the validity of CPR 142 on any ground, and that its judgment that this

regulation was "void and of no force and effect whatsoever" was beyond its power to declare.

2. It may be noted that the court below declared CPR 142 void because it found that the regulation was "arbitrary and that no effort was made by the Office of Price Stabilization to comply with the provisions of Title 50 U.S.C. App., § 2104, in advising or consulting with the members of the Industry with respect thereto."[4] Of course, if a failure to comply with the requirements of that section might have vitiated the regulation, that decision would nonetheless be for the Emergency Court. *Rosensweig* v. *United States,* 144 F. 2d 30 (C.A. 9), certiorari denied, 323 U.S. 764; *Superior Packing Company* v. *Porter,* 156 F. 2d 193 (C. A. 8) certiorari denied, 329 U. S. 788 (both cases involving an alleged failure of the Price Administrator to consult with the Secretary of Agriculture in connection with the imposition of price ceilings on agricultural commodities). But even the Emergency Court of Appeals has recognized that it does not have the power to invalidate a regulation because there has been no industry consultation. In *Norman-Frank, Inc.,* v. *Arnall,* 196 F. 2d 502, dealing with such a challenge to a price regulation, that court said:

> With respect to the first objection above, § 404 of the Defense Production Act [50 U.S.C. App. 2104] provides: "In carrying out the provisions of this title, the President shall, so far as practicable, advise and consult with, and establish and utilize committees of, representatives of persons substantially affected by regulations or orders issued hereunder." There was a similar provision

[4] Except for this alleged failure to consult, there is nothing in the Findings of Fact on which to base a conclusion of arbitrariness.

in § 2(a) of the Emergency Price Control Act of 1942, 56 Stat. 23, 50 U.S.C.A. Appendix, § 901 et seq. We repeatedly held under the 1942 Act that the Administrator had broad latitude within which to exercise independent judgment as to the extent to which it was practicable to consult with members of the industry before imposing controls, and that in seeking to upset a regulation on the ground of his failure to do so a complainant shouldered the heavy burden of establishing both that the Administrator failed to consult with the industry and that it would have been practicable for him to have done so. * * * In fact, we never found occasion to set aside a regulation on this ground, even assuming the provision in question could have been deemed mandatory, and not directory merely. At any rate, the point has been rendered academic by a provision in the Defense Production Act of 1950 which had no counterpart in the Price Control Act of 1942. Section 709 of the present Act reads in part as follows:

"* * * Any rule, regulation, or order, or amendment thereto, issued under authority of this Act shall be accompanied by a statement that in the formulation thereof there has been consultation with industry representatives, including trade association representatives, and that consideration has been given to their recommendations, or that special circumstances have rendered such consultation impracticable or contrary to the interest of the national defense, *but no such rule, regulation, or order shall be invalid by reason of any subsequent finding by judicial or other authority that such a*

statement is inaccurate." [Emphasis supplied by the Emergency Court of Appeals.]

CPR 142 declared that "in formulating this regulation the Director has consulted with representatives of the industry, including trade association representatives, to the extent practicable under the circumstances and has given consideration to their recommendations" (R. Dix 36). This statement satisfies the requirements of § 404, and under § 459, the regulation may not be found invalid even if this statement was proved inaccurate. Thus the court below not only invaded the exclusive jurisdiction of another court in testing the validity of the regulation, but applied in that test an improper standard.

II

The President of the United States and Those to Whom He Delegated Authority Under the Defense Production Act Were Not Estopped from Enforcing CPR 142 by the Alleged Statements and Actions of the Los Angeles Representatives of the Office of Price Stabilization.

The appellees called on the Los Angeles office of OPS in May, 1952, because they believed that under the new price regulation they could not profitably continue in business. The court below has found that the OPS representatives with whom they discussed the matter agreed with them. Without finding that the appellees were told they might properly continue under L-117 and the General Ceiling Price Regulation, the court held that the President and those to whom he delegated authority under the Act were estopped by this agreement of the Los Angeles officials and their knowledge that the appellees were following those superseded regulations.

There is nothing in the Defense Production Act or in the regulations promulgated thereunder which gave to any of the officials with whom the appellees met the power to waive the force of an official regulation. Nor is there anything which authorized the appellees to rely upon the oral statements of any Government official or to assume that in the absence of action by the Government they were permitted to proceed as though CPR 142 had never been issued. On the contrary, the Act and the regulations established a comprehensive scheme for obtaining the relief which the appellees sought, and they ignored those procedures at their peril.

Section 409(c) of the Act, 50 U.S.C. App. § 2109(c), which is the authority for actions to recover overcharges, provides that "the President may not institute any action under this subsection on behalf of the United States—(1) if the violation arose because the person selling the material or service acted upon and in accordance with the written advice and instructions of the President or any official authorized to act for him; * * *," and Section 407, 50 U.S.C. App. § 2107 allows for the protest of any price regulation "in accordance with regulations to be prescribed by the President." Price Procedural Regulation 1, Revised, 17 F.R. 3787, April 29, 1952, sets forth the rules governing protests, §§ 50-80, and provides two additional measures of relief for persons subject to price regulations: first, they might petition for amendment, §§ 41-45; or second, they might seek an official interpretation, §§ 91-93.[5]

[5] CPR 142 itself refers to petitions for amendment and interpretations. In connection with the first, it refers the reader directly to Price Procedural Regulation No. 1, Revised. In connection with the second, it states that "any action taken by you in reliance upon and in conformity with a written official interpretation will con-

Protests and petitions for amendment were required to be filed with the Recording Secretary of the OPS in Washington, §§ 53(b), 42; requests for interpretation were to be filed with the District Counsel of the local District Office, § 92. Protests and petitions for amendment could be granted only by the Director, §§ 59, 76, 44; official interpretations could be made only by the Chief Counsel of OPS or one of his delegates, § 91(b). Each of the three procedures was required to be instituted in writing, §§ 54, 42, 92. The OPS action on protests and requests for interpretations was specifically required to be confirmed in writing. §§ 59(b), 77, 78, 91(b). The appellees' counsel stated explicitly before the court that "we don't contend in behalf of any of these defendants that there was a written memorandum."

The United States Government can neither be bound nor estopped by the unauthorized acts or representations of its officials. *Lee* v. *Munroe,* 7 Cranch 366, *Whiteside* v. *United States,* 93 U.S. 247, *United States* v. *Stewart,* 311 U.S. 60. It does not matter that the action of the official may seem to fall within the scope of his general authority, so long as his authority so to act does not exist. As the Court stated in *Whiteside* v. *United States* (93 U.S. at 257):

> Although a private agent, acting in violation of specific instructions, yet within the scope of his

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stitute action in good faith pursuant to this regulation", and again refers to the Price Procedural Regulation.

Some regulations in addition contained adjustment provisions, see §§ 21-30 but none appears in CPR 142. A petition for amendment was therefore necessary before an application for adjustment could be made, § 21. In any event, these applications too had to be made in writing, § 24, and answered in the same way, § 27.

> general authority, may bind his principal, the rule as to the effect of the like act of a public agent is otherwise, for the reason that it is better that an individual should occasionally suffer from the mistakes of public officers or agents, than to adopt a rule which, through improper combinations or collusion, might be turned to the detriment or injury of the public.

This Court itself twice declared in actions under the Emergency Price Control Act of 1942 that the Government could not be estopped by the representations or advice of OPA officials who were not empowered to interpret or amend official regulations. *Fleming* v. *Hanscom,* 162 F. 2d 164; *Mechanical Farm Equipment Distributors* v. *Porter,* 156 F. 2d 296, certiorari denied 329 U. S. 771. The appellees did not suggest in the court below, nor did that court itself indicate, any authority under which the particular OPS personnel with whom we are concerned were empowered to relieve the appellees of their obligation to follow CPR No. 142, or to waive the procedures set forth in the Price Procedural Regulation. We submit, moreover, that an examination of that regulation clearly proves the contrary.

In this connection the opinion of the Emergency Court of Appeals in *Wells Lamont Corp.* v. *Bowles,* 149 F. 2d 364, 367 certiorari denied, 326 U. S. 730, is apposite:

> It must be presumed that complainant was advised of the procedure it was required to follow in order to obtain an official interpretation upon which it could properly rely. And, since it failed to comply with the prescribed method, it is not entitled to rely upon unofficial oral advice given by

> subordinate officials in the Office of Price Administration. At first blush, this may seem harsh but, obviously, the Administrator cannot be bound by various oral interpretations which happen to be made by his hundreds, perhaps thousands, of employees, in violation of proposed regulations. He has prescribed a reasonable procedure by which persons subject to the regulations may obtain official interpretations, by which all will be bound. Complainant is not entitled to rely on an unofficial interpretation.

See also *Bowles* v. *Indianapolis Glove Company,* 150 F. 2d (C. A. 7), certiorari denied, 326 U. S. 794, *Schreffler* v. *Bowles,* 153 F. 2d 1 (C. A. 10), certiorari denied, 328 U. S. 870.

It should be noted that the instant case well illustrates one reason for the wise and constant insistence of the OPS that any request for a change in or interpretation of price regulations and any action thereon be made in writing. The state of the evidence here is such that it is not even clear that the elements of estoppel are presented, the question of authority aside. Three of the appellees testified as to what took place in the meetings with the OPS representatives. Two stated that they were neither told that they might continue under L-117 or that they might not. Only one said that such permission had been given, but he was unable to identify the person who had purported to grant it.[6] There was, moreover, testimony by the only two OPS

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[6] Further evidence that the appellees could not reasonably have relied upon any assumption that CPR 142 was a dead letter lies in the fact that the regulation was amended in a minor part on August 21, 1952, well after these meetings had commenced. 17 F.R. 7692.

personnel called, of those who were present at the meetings, that the appellees had been specifically told that they would have to continue to obey CPR No. 142 until it was amended or revoked (R. Dix. 157, 232). While we do not deny that such a conflict of testimony can be resolved only by a trier of the facts, we do respectfully submit that had the appellees followed prescribed procedures there would be written evidence obviating any necessity of the Government in its enforcement of these regulations to rely on the vagaries of memory.

Having ignored the clear procedural requirements of the applicable regulations, and having chosen instead to rely upon the alleged statements of officials who were in any case without authority to waive or amend a price regulation, it is respectfully submitted that the appellees cannot estop those to whom Congress has granted authority from enforcing CPR 142 against them, and that their sole remedy must lie with their chance of having the regulation found invalid in the Emergency Court of Appeals.

III

Appellee in No. 14,441 Was a Dealer Subject to Ceiling Price Regulation 142

The appellee in No. 14,441, Helen Carvajal, like the appellees in the other fourteen cases, reconditioned used agricultural containers and then resold them. Unlike all the others, however, she did not purchase any of her containers directly from retailers. Rather, she purchased from dealers who had themselves bought the containers from retailers.[7] By reason of this fact only,

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[7] Inasmuch as the court below found that the appellee purchased all her containers from persons who were dealers subject to CPR 142 and in view of the court's restricted interpretation of Section 12(b) of that regulation, that court has necessarily found that the

the court below found that this appellee was not a "dealer" within the definition set forth in Section 12(b) of CPR 142 (R. Dix 38):

> *Dealer:* This term means a person who has facilities to store, repair, recondition, or rebuild agricultural containers and who purchases them from retailers for resale.

Since it was uncontested that appellee Carvajal was subject to the regulation only as a dealer, if at all, the court below for this reason as well as for those discussed above entered judgment for her.

It is respectfully submitted that the court below erred in confining the coverage of CPR 142 so narrowly. Section 12 of the regulation did not purport to set out inflexible definitions. It is prefaced by the statement that "this ceiling price regulation and the terms which appear in it shall be construed in the following manner, *unless otherwise clearly required by the context:* * * *" (emphasis supplied). The context of CPR 142 clearly required that one operating as did appellee Carvajal should be subject to those ceiling prices which the regulation imposed upon dealers.

The "Statement of Considerations" should certainly be looked to in determining the intended coverage of the regulation. In this instance, it declared that "this regulation establishes dollars and cents ceiling prices for used wooden agricultural containers sold in the area adjacent to the cities of Los Angeles and San Diego, California" (R. Dix 36). This sentence clearly evinced an intention that *all* sales of such containers were to be subject to the ceilings set in the regulation,

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persons from whom appellee Carvajal purchased had themselves obtained the containers from retailers.

unless they were expressly excepted.[8] Moreover, this intention was made even more clear as the Statement continued:

> Approximately 630 wholesalers-growers, packers and shippers of fruits and vegetables—sell their products to retail stores, restaurants, hotels, hospitals and similar organizations in that area. All of these latter organizations for the purpose of this regulation are classified as retailers. The food products are packaged in wooden or partially wooden containers and when their contents are sold to the retailers, title to the containers is transferred to them. No definite or specific price is charged for the package. After the contents are removed, the containers, in varying states of disrepair, are sold to used-containers dealers who maintain facilities to store, repair, recondition or rebuild them. There are approximately 127 used-container dealers in the affected area.
>
> The dealers purchase crates in small odd lots from a comparatively large number of retailers. They recondition the containers and accumulate them in their yards. They are sorted into the sizes and types commonly used by the wholesalers of fruits and vegetables and are sold to them for reuse in the handling of those products.
>
> Because of the seasonal nature of the fruit and

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[8] Such an express exception appears in Section 12(g), defining "retailer". This term expressly excludes Army and Navy establishments. It may be noted that so important was uniformity of application considered that this exception was deleted by Amendment 1 to CPR 142, effective August 21, 1952. 17 F.R. 7692. The Statement of Considerations in this Amendment declares that "this amendment, accordingly, is issued so that all resellers in the affected area can sell the covered commodities on the same basis."

vegetable business ceiling prices under the General Ceiling Price Regulation were established during a period of fewest sales, and proved to be inadequate for a large segment of the used-container industry, particularly the used-container dealers.[9]

The General Ceiling Price Regulation level of prices created an unbalanced condition in the cost-price relationship between the three classes of persons involved in this industry in the Los Angeles and San Diego area and has impeded the free flow of containers which normally exists.

CPR 142 was thus intended to restore a balance to the cost-price relationships in this entire cycle of trade. The regulation, by establishing ceilings for the sales of both retailers and dealers, purported to fix the price of these containers at every step in the cycle at which a price was charged. To permit one who was carrying on the functions of a dealer to operate uncontrolled within this tightly regulated cycle simply because in one respect his actions were indirect rather than direct would have threatened this entire balance and have frustrated the purposes of the regulation and to that extent the purposes of the Defense Production Act.

This regulation should not be construed in a way which would destroy its purpose if a broader meaning than that found by the court below can reasonably be inferred. We submit that in this respect the regulation should be treated like a statute. The text should be interpreted "so far as the meaning of the words fairly permit so as to carry out in particular cases

[9] It may be noted that appellee Carvajal was one of the dealers who sought relief from the General Ceiling Price Regulation in 1951, and received it in L-117 (R. Carvajal 10-11, R. Dix 95).

the generally expressed legislative policy." *Securities Exchange Commission* v. *C. M. Joiner Leasing Corporation,* 320 U.S. 344, 350-51; see also *United States* v. *American Trucking Association,* 310 U. S. 534; *Richmond F. and P. R.R.* v. *Brooks,* 197 F. 2d 404, 407 (C.A. D.C.) certiorari denied, 344 U.S. 828. CPR 142 was concerned primarily with the prices at which used containers were sold. Insofar as it affected "dealers", therefore, it was aimed at those persons who were engaged in reconditioning and reselling such containers. For its purposes it did not matter whether these were obtained directly or indirectly from the retailer. Cf. *United States* v. *Giles,* 300 U.S. 41 (act defining crime only in terms of direct action prohibits achieving the same result by indirect action). Section 11 of the regulation demonstrates this proposition. It declares to be a violation "any means or device which results in obtaining indirectly a higher price than is permitted by this regulation * * *." We are not concerned with proving whether or not this appellee deliberately attempted to evade this regulation. The question here involves the regulation's intended coverage. Certainly in Section 11 the Administrator made clear his intention that the regulation would control all the transactions which affected the balance he was attempting to set, whether carried out directly or indirectly. The appellee was thus put on notice, we submit, that her operations came under the control of this regulation.

CONCLUSION

For the foregoing reasons it is respectfully submitted that the judgment of the court below should be reversed.

WARREN E. BURGER,
Assistant Attorney General.

LAUGHLIN E. WATERS,
United States Attorney.

SAMUEL D. SLADE,
JOHN J. COUND,
Attorneys, Department of Justice.

JANUARY, 1955.

APPENDIX

The pertinent provisions of the Defense Production Act of 1950, 64 Stat. 798, 50 U. S. C. App. §§ 2061 *et seq.*, as amended, are as follows:

Section 404, 50 U. S. C. App. § 2104:

In carrying out the provisions of this title [sections 2101-2112 of this Appendix], the President shall, so far as practicable, advise and consult with, and establish and utilize committees of, representatives of persons substantially affected by regulations or orders issued hereunder.

Section 408(c), as amended, 50 U. S. C. App. § 2108(c):

* * * The Emergency Court of Appeals, and the Supreme Court upon review of judgments and orders of the Emergency Court of Appeals, shall have exclusive jurisdiction to determine the validity of any such regulation or order issued under this title [sections 2101-2112 of this Appendix], or under the Housing and Rent Act of 1947, as amended [sections 1884, 1891-1894 and 1895-1902 of this Appendix and section 1744 of Title 12]. Except as provided in this section, no court, Federal, State, or Territorial, shall have jurisdiction or power to consider the validity of any such regulation or order, or to stay, restrain, enjoin, or set aside, in whole or in part, any provision of this title [sections 2101-2112 of this Appendix], or the Housing and Rent Act of 1947, as amended [sections 1884, 1891-1894 and 1895-1902 of this Appendix and section 1744 of Title 12], authorizing the issuance of such regulations or orders, or any provision

of any such regulation or order, or to restrain or enjoin the enforcement of any such provision.

[For the convenience of the Court the comparable provision of the Emergency Price Control Act of 1942, 56 Stat. 31, 50 U. S. C. App. § 924(d), is herein set out.

[Section 924(d):

[* * * The Emergency Court of Appeals, and the Supreme Court upon review of judgments and orders of the Emergency Court of Appeals, shall have exclusive jurisdiction to determine the validity of any regulation or order issued under section 2 [former section 902 of this Appendix], of any price schedule effective in accordance with the provisions of section 206 [former section 926 of this Appendix], and of any provision of any such regulation, order or price schedule. Except as provided in this section, no court, Federal, State, or Territorial, shall have jurisdiction or power to consider the validity of any such regulation, order, or price schedule, or to stay, restrain, enjoin, or set aside, in whole or in part, any provision of this Act [former sections 901-922 and 923-946 of this Appendix] authorizing the issuance of such regulations or orders, or making effective any such price schedule, or any provision of such regulation, order, or price schedule or to restrain or enjoin the enforcement of any such provision.]

Section 409(c), 50 U. S. C. App. § 2109:

If any person selling any material or service violates a regulation or order prescribing a ceiling or ceilings, the person who buys such material or

service for use or consumption other than in the course of trade or business may, within one year from the date of the occurrence of the violation, except as hereinafter provided, bring an action against the seller on account of the overcharge. In any action under this subsection, the seller shall be liable for reasonable attorney's fees and costs as determined by the court, plus whichever of the following sums is greater: (1) such amount not more than three times the amount of the overcharge, or the overcharges, upon which the action is based as the court in its discretion may determine, or (2) an amount not less than $25 nor more than $50 as the court in its discretion may determine: *Provided, however,* That such amount shall be the amount of the overcharge or overcharges if the defendant proves that the violation of the regulation or order in question was neither wilful nor the result of failure to take practicable precautions against the occurrence of the violation. For the purposes of this section the word "overcharge" shall mean the amount by which the consideration exceeds the applicable ceiling.

If any person selling any material or service violates a regulation or order prescribing a ceiling or ceilings and the buyer either fails to institute an action under this subsection within thirty days from the date of the occurrence of the violation or is not entitled for any reason to bring the action, the President may institute such action on behalf of the United States within such one-year period, or compromise with the seller the liability which might be assessed against the seller in such an action. If such action is instituted, or such liability

is compromised by the President, the buyer shall thereafter be barred from bringing an action for the same violation or violations. Any action under this subsection by either the buyer or the President, as the case may be, may be brought in any court of competent jurisdiction. A judgment in an action for damages, or a compromise, under this subsection shall be a bar to the recovery under this subsection of any damages in any other action against the same seller on acount of sales made to the same purchaser prior to the institution of the action in which such judgment was rendered, or prior to such compromise. The President may not institute any action under this subsection on behalf of the United States—

(1) if the violation arose because the person selling the material or service acted upon and in accordance with the written advice and instructions of the President or any official authorized to act for him;

(2) if the violation arose out of the sale of any material or service to any agency of the Government, and such sale was made pursuant to the lowest bid made in response to an invitation for competitive bids.

Section 709, 50 U. S. C. App. § 2159:

The functions exercised under this Act [sections 2061-2166 of this Appendix] shall be excluded from the operation of the Administrative Procedure Act (60 Stat. 237) except as to the requirements of section 3 thereof [section 1002 of Title 5]. Any rule, regulation, or order, or amendment thereto, issued

under authority of this Act [sections 2061-2166 of this Appendix] shall be accompanied by a statement that in the formulation thereof there has been consultation with industry representatives, including trade association representatives, and that consideration has been given to their recommendations, or that special circumstances have rendered such consultation impracticable or contrary to the interest of the national defense, but no such rule, regulation, or order shall be invalid by reason of any subsequent finding by judicial or other authority that such a statement is inaccurate.

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